84-1324

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

R. A. ADAMS AND JOSEPH MONGIELLO, PETITIONERS

v.

ROBERT M. JASINSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
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QUESTION PRESENTED

Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages suit against a public official on the ground that the legal standards allegedly violated were clearly established at the time in question.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

R. A. ADAMS AND JOSEPH MONGIELLO, PETITIONERS

v.

ROBERT M. JASINSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of R. A. Adams and Joseph Mongiello, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 3a, 4a, 5-7a, 8a) are unreported. The opinions of the district court (App., *infra*, 1a, 2a) are also unreported.

JURISDICTION

The court of appeals dismissed petitioners' appeal for lack of appellate jurisdiction on November 30, 1983 (App., *infra*, 3a). On February 8, 1984, the court vacated this dismissal (App., *infra*, 4a). On September 26, 1984, the court again dismissed for lack of jurisdiction (App., *infra*, 5a-7a). On November 26, 1984, the court of appeals denied petitioners' petition for rehearing (App., *infra*, 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

8 U.S.C. 1357(a) provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service * * * shall have power without warrant—
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens * * * any * * * vehicle * * * for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States * * *.

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

1. On April 18, 1982, the United States Border Patrol established a roadblock and checkpoint on United States Route 1, just south of Florida City, Florida, and just north of the convergence of the only two roads coming north from the Florida Keys. This checkpoint, which had been utilized in the past (see *United States* v. *Gordo-Marin*, 497 F. Supp. 432 (S.D. Fla. 1980)), was strategically located to enable Immigration and Naturalization Service officers to inspect all motor vehicles coming north from the Keys. The purpose of the checkpoint was to determine whether illegal aliens were being transported from the south Florida shores into the interior of the United States. App, *infra*, 20a, 25a-26a.

On its first day of operation, the checkpoint caused a massive traffic jam (App., *infra*, 11a, 22a).[1] One of those held up in traffic was respondent, Robert Jasinski, a Miami attorney (*ibid.*). When respondent's car reached the checkpoint stop sign, he spoke with an INS officer and was then referred to a secondary inspection area, out of the main line of traffic, and was asked to open his car trunk (*id.* at 12a, 22a-23a). Respondent refused and demanded a search warrant (*id.* at 12a-13a, 23a). Petitioner R.A. Adams, Chief Patrol Agent of the Miami Border Patrol Sector, Miami, Florida, cited Section 287 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1357, as authority for conducting the inspection and advised respondent that if he did not open the trunk, the Border Patrol would do so (App., *infra*, 12a-13a, 23a). When respondent again refused, petitioner Adams told officers to open the trunk with a crowbar. Respondent then opened the trunk himself. After the trunk was inspected and citizenship information was obtained, respondent was permitted to leave the inspection site. App., *infra*, 13a, 23a.

2. Respondent brought suit for damages in the United States District Court for the Southern District of Florida against Agent Adams and petitioner Joseph Mongiello, the former INS Associate Regional Commissioner for the Southern Region. Petitioner Mongiello directed the establishment of the Florida City checkpoint in April 1982 but was not present during its operation.

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[1] The following facts regarding the stopping and search of respondent's car are undisputed. We have included citations both to respondent's complaint or affidavit in opposition to summary judgment and to petitioners' affidavits, all of which are reproduced in the appendix.

Respondent claimed that the search of his car trunk violated the First, Fourth and Fifth Amendments, as well as 42 U.S.C. 1981 and 1983.[2] See App., *infra*, 10a-17a.

Petitioners moved to dismiss respondent's suit, or in the alternative for summary judgment, on the ground that they were entitled to qualified immunity pursuant to *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Among other things, petitioners argued that the search of respondent's car was constitutional because it was conducted at the functional equivalent of the border. See *United States* v. *Ramsey*, 431 U.S. 606, 622 (1977); *United States* v. *Alvarez-Gonzales*, 542 F.2d 226 (5th Cir. 1976) (remanding for factual findings), and 561 F.2d 620 (5th Cir. 1977) (affirming after remand); *United States* v. *Hart*, 506 F.2d 887 (5th Cir.), vacated and remanded, 422 U.S. 1053 (1975), reaff'd, 525 F.2d 1199 (5th Cir.), cert. denied, 428 U.S. 923 (1976). Petitioners noted that, prior to the search of respondent's car, a United States magistrate had found the very checkpoint in question to be the functional equivalent of the border. See *United States* v. *Gordo-Marin*, 497 F. Supp. at 436 n.2. Accordingly, petitioners maintained that they did not violate any "clearly established statutory or constitutional right[ ]" and were thus entitled to qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. at 818.

The district court denied petitioners' motions (App., *infra*, 1a, 2a) but stayed trial pending appeal of the immunity claims.

In November 1983, the court of appeals summarily dismissed petitioners' appeal for lack of jurisdiction un-

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[2] Respondent also asserted a claim for injunctive relief against the Border Patrol. App., *infra*, 15a.

der 28 U.S.C. 1291 (App., *infra*, 2a). After petitioners filed a petition for rehearing and suggestion for rehearing en banc, the panel vacated its order of dismissal and agreed to hear argument (*id.* at 3a). After briefing and argument, however, the panel again dismissed the appeal for lack of jurisdiction without further explanation (*id.* at 4a-6a).

REASONS FOR GRANTING THE PETITION

This case presents the same question now before the Court in *Mitchell* v. *Forsyth*, cert. granted, No. 84-335 (Oct. 29, 1984), *i.e.*, whether an order denying a motion to dismiss a complaint on qualified immunity grounds is appealable prior to trial under the collateral order doctrine. Here, as in *Mitchell*, petitioners moved to dismiss respondent's claims, arguing that they were entitled to qualified immunity under *Harlow* because, on the undisputed facts, they had not violated any clearly established legal standard. Here, as in *Mitchell*, the court of appeals dismissed an appeal from the denial of such motions for lack of jurisdiction. If the judgment of the court of appeals is left standing, petitioners will have to undergo the burdens and expense of discovery and trial before having the opportunity to obtain appellate review of their qualified immunity claims. They will thereby forfeit an important part of the protection that the qualified immunity defense is intended to provide. See Pet. Br. 14-16, *Mitchell* v. *Forsyth*, *supra*.[3] We are petitioning for a writ of certiorari to prevent petitioners' qualified immunity rights from being irretrievably sacrificed in this way.

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[3] We are providing counsel for respondent with a copy of our brief in *Mitchell* v. *Forsyth*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Mitchell* v. *Forsyth*, No. 84-335.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
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Assistant to the Solicitor General
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Attorneys

FEBRUARY 1985

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-814-Civ-JWK

ROBERT M. JASINSKI, PLAINTIFF,

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL, DEFENDANTS

ORDER DENYING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT REGARDING DEFENDANT JOE MONGIELLO

The Court having read the defendant Joe Mongiello's motion to dismiss, or in the alternative motion for summary judgment, motion for evidentiary hearing and motion for oral argument, and being fully advised in the premises, now therefore:

IT IS ORDERED that the above-noted motions are hereby DENIED.

DONE AND ORDERED this 18th day of February, 1983.

/s/ _____
JAMES W. KEHOE
United States District Judge

Copies furnished: Robert A. Rosenberg, AUSA
Alan S. Kessler, Esquire

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 82-814 Civ-JWK

ROBERT M. JASINSKI, PLAINTIFF

v.

R. A. ADAMS, JOE MONGIELLO AND UNITED STATES BORDER PATROL, DEFENDANTS

ORDER DENYING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT REGARDING DEFENDANT R. A. ADAMS

The Court having read defendant R. A. Adams' motions to dismiss, or in the alternative motion for summary judgment; motion for evidentiary hearing and motion for oral argument, and being fully advised in the premises, now therefore:

IT IS ORDERED that the above-noted motions are DENIED.

DONE AND ORDERED this 18th day of February, 1983.

/s/ _____
JAMES W. KEHOE
United States District Judge

Copies furnished: Robert A. Rosenberg, AUSA
Alan S. Kessler, Esquire

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5176

ROBERT M. JASINSKI, PLAINTIFF-APPELLEE,

v.

R. A. ADAMS, JOE MONGIELLO, AND
UNITED STATES BORDER PATROL,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Nov. 30, 1983]

BY THE COURT:

IT IS ORDERED that the appellants' motion to file reply brief out of time is denied.

It is further ordered that this appeal is dismissed for lack of jurisdiction.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5176

ROBERT M. JASINSKI, PLAINTIFF-APPELLEE

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Feb. 8, 1984]

Before HATCHETT, ANDERSON and CLARK, *Circuit Judges.*

BY THE COURT:

1. This court's order of November 30, 1983, dismissing this appeal for lack of jurisdiction is vacated.

2. The question of jurisdiction in this court is carried with the case.

3. Petition for Rehearing and Suggestion for Rehearing En Banc are moot.

4. The appellant shall file a supplemental brief on jurisdiction not later than fourteen days after the date of this order. The appellee shall file its supplemental brief on jurisdiction fourteen days after receipt of appellant's brief.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5176

D.C. Docket No. 82-0814-CIV

ROBERT M. JASINSKI, PLAINTIFF-APPELLEE,

v.

R. A. ADAMS, JOE MONGIELLO, AND
UNITED STATES BORDER PATROL,
DEFENDANTS-APPELLANTS

APPEAL FOR THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JUDGMENT

Before HATCHETT and CLARK, *Circuit Judges*, and STAFFORD*, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, DISMISSED for lack of jurisdiction;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida, sitting by designation.

Entered: September 26, 1984
For the Court: Spencer D. Mercer, Clerk.

BY: _____
WARREN B. GODFREY
Deputy Clerk

ISSUED AS MANDATE:

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5176

ROBERT M. JASINSKI, PLAINTIFF-APPELLEE

v.

R. A. ADAMS, JOE MONGIELLO, AND
UNITED STATES BORDER PATROL,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

September 26, 1984

Before HATCHETT and CLARK, *Circuit Judges*, and STAFFORD*, District Judge.

PER CURIAM:

This appeal is dismissed for lack of jurisdiction.

DISMISSED.

---

*Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida, sitting by designation.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5176

ROBERT M. JASINSKI, PLAINTIFF-APPELLEE

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion September 26, 11 Cir., 1984, ____ F.2d____)
(November 26, 1984)

Before HATCHETT and CLARK, *Circuit Judges*, and STAFFORD* *District Judge.*

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having

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*Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida, sitting by designation.

voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

/s/ :

THOMAS A. CLARK
United States Circuit Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 82-0814-Civ-JWK
JURY TRIAL DEMANDED

ROBERT M. JASINSKI, PLAINTIFF

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL, DEFENDANTS

[Filed June 10, 1982]

AMENDED COMPLAINT

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. Sections 1981 and 1983, 28 U.S.C. 1343, 28 U.S.C. 1346, and the First, Fourth and Fifth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. Sections 1331 and 1343(1)(2)(3)(4) and the aforementioned statutory and constitutional provisions. The Plaintiff seeks civil damages against the Defendant, R.A. ADAMS, and for injunctive relief from further unlawful activity as to all Defendants.

2. That at all times herein mentioned, the Plaintiff, ROBERT M. JASINSKI, was a resident of Broward County and he is a citizen of the United States.

3. Defendant, JOE MONGIELLO, is the Chief of Border Patrol of Immigration and Naturalization Service. He is sued in his individual and official capacity for the purpose of injunctive relief.

4. Defendant, ROBERT A. ADAMS, is the Chief Border Patrol Agent for the United States Border Patrol in South Florida. He is sued in his individual and official capacity for the purpose of injunctive relief.

5. That the acts of the Defendants were done under the color of law and under the color of their authority as agents for the United States Border Patrol, Immigration and Naturalization Services [sic], Department of Justice.

The conduct of the Defendants embarrassed and humiliated the Plaintiff, thereby causing emotional distress.

6. On or about the hour of 4:30 P.M. on April 18, 1982, the Plaintiff, ROBERT M. JASINSKI, was returning from a successful weekend of big game fishing off Lower Metacumbe Key.

7. That the Plaintiff, in order to avoid the usual Key's Sunday traffic jam, left the "Fishing Capitol of the World" at 2:30 P.M. He reached the vicinity of the U.S. 1 and Card Sound Road at approximately 4:20 P.M. and took his place on a line approximately fifty cars back from a roadblock.

8. That upon reaching the vicinity of the roadblock, the Plaintiff, noticed numerous heavily armed and uniformed agents of the U.S. Border Patrol of obvious Mexican ancestry.

9. That upon reaching the immediate vicinity of two large "STOP" signs, the Plaintiff noticed two border patrol agents directing traffic into two northbound lanes, divided by orange cones.

10. That when the Plaintiff finally reached the aforementioned "STOP" signs, an unknown agent of the Defendants, indicated by hand signals to lower the window on the passenger side of the Plaintiff's vehicle.

11. (a) That the Plaintiff was driving a camel brown 1978 Camero, LT, an automobile rated by "Consumer Reports" as having an unusually small trunk area. The Plaintiff was, at the time he reached the Defendant's "STOP" signs, seated in the driver's seat. Seated on the passengers seat, in plain view, was: Hall, Kamisar, Lafave & Israel, Modern Criminal Procedure (3rd Ed. 1969); West, Federal Rules, Criminal Procedure (1979 Ed.); Antieau, Federal Civil Rights Act (1971); Na-

tional Lawyers Guild, Police Misconduct Law and Litigation (1981 Ed.); Trawick's, Florida Practice and Procedure (1978 Ed.); and Hermann, Search and Seizure Checklists (2nd Ed. 1982). Seated directly behind the Plaintiff was a red, 48 quart "Igloo Cooler" filled with ice and coryphaena hippuri. On the right side sat a black and silver colored "Tech 1" shoulder bag filled with smelly clothes. On the floor behind the driver's seat was a G.E. portable radio, a pair of "Fisherman's Pliar's" a set of Crock Sticks (used to sharpen fillet knives). Other items in plain view included a "flyer" (8th Annual Waterway Cleanup); a roll of "GALA" towels, a pair of canvas "Topsider" boating shoes" and a large brown paper bag containing "DORITOS NEW CRISPY LIGHTS". On the dashboard sat the Plaintiff's plastic "Laughing Budda".

(b) The Plaintiff was clad in Topsider Boating moccasins, "patagonia" rock climbing shorts and a short sleeve shirt by Aldolfo.

12. That upon lowering the window on the passenger side, the Plaintiff asked the agent "why are you stopping me?" The boarder patrol agent responded, with a distinct foreign accent, "you will have to ask the supervisor that question." The Plaintiff asked where he should proceed, whereupon the boarder patrol agent indicated by hand signal, the lane to the right of the orange cones. The Defendants neither asked the Plaintiff any questions nor asked for any identification from Plaintiff.

13. That upon compliance with the agent's command, an agent appeared at the driver's window and demanded that the Plaintiff "Open your trunk." The Plaintiff asked why, and was told he had to open the trunk or he would not be permitted to leave. The agent did not ask or examine any of the contents in the passenger's area of the vehicle.

14. That the Plaintiff responded that "I am not going to open my trunk; if you want to look inside, get a search warrant." At this time, Defendant R. A. ADAMS appeared and informed the Plaintiff that he would use a crowbar to open the trunk if Plaintiff would not comply. CHIEF ADAMS stated that he would open the trunk if the Plaintiff would hand him the key—the Plaintiff refused.

15. That the Plaintiff then inquired as to the lawful authority upon which CHIEF ADAMS based his right to open the Plaintiff's trunk, whereupon the Defendant ADAMS responded "Section 1357, the courts have already ruled on this."

16. That the Plaintiff having asserted his right pursuant to the Fourth Amendment of the Constitution of the United States, not to have his trunk opened, then heard Defendant ADAMS give the command to open the trunk by crowbar, whereupon the Plaintiff heard the scraping of paint and the cracking of plastic.

17. That the Plaintiff, fearing for the safety of his money contained in the trunk, for safekeeping, and realizing the inconvenience of having no trunk, exited from the auto and opened the trunk with his keys.

18. That upon opening the trunk, the Plaintiff removed his money. Next, an unknown border agent placed his hands on the felt floor mat, presumably to search for aliens, in the nearly empty trunk. The trunk contained a jack, G.E. "HELP" C.B. radio, a hand held and electric drill, a can of "FIX-A-Flat," a yellow waterproof container, an empty paper bag and a "Coleman" electric inflater (due to the small trunk space, the Plaintiff does not carry a spare tire).

19. That CHIEF ADAMS specifically advised Plaintiff, prior to opening the trunk, that Plaintiff would not be permitted to leave until his trunk was opened. The Plaintiff then asked him if he was under arrest, whereupon Defendant Adams responded in the negative, but

again reasserted his position that the Plaintiff could not leave until the trunk was opened.

20. That the aforementioned conduct on the part of the Defendants demonstrates a wilfull, wanton and reckless absence of respect for and knowledge of the most basic constitutional rights afforded to citizens of the United States of America.

21. That the Defendants checkpoint was a permanent one, on a stretch of highway not compatable with safe operation—it was on one of the most dangerous and heavily weekend congested roadways in Florida.

22. That the Plaintiff is a frequent visitor to the Florida Keys, having made approximately 35 trips during the past 15 months.

23. That the aforementioned conduct on the part of the Defendants was taken without any objective basis of fact establishing probable cause to search the Plaintiff's trunk.

24. That upon information and belief, the Defendants conduct of establishing a checkpoint in the vicinity of U.S. 1 and Card Sound Road has caused maximum interdiction of domestic traffic and does not bear any reasonable relationship to the monitoring of international traffic, but is simply a dragnet operation established to apprehend those aliens that have entered the United States in the past, not the present, at locations other than the Florida Keys.

25. That the conduct on the part of the Defendant's was nothing less than *the actual arrest and unlawful search of the Plaintiff*, pursuant to that arrest.

26. That upon information and belief, the reckless lack to thought and planning that went into the surprise roadblock, resulted in a monumental traffic jam, with vehicles backed up as far as twenty (20) miles, numerous fights due to the extreme heat of the day, and sometimes short fused tempers on the part of the public; in effect, the public was imprisoned on the road.

27. That nothing short of a permanent injunction, setting forth detailed safeguards to be followed by the Defendant's can adequately protect the Plaintiff and public from future *"brownshirt activity."*

28. That upon information and belief the actions of the Defendants resulted from and were taken pursuant to a de facto policy of the defendants and that the Defendants, the supervisory and policy-making officers and officials of the said Customs Service, despite their knowledge of the said illegal policy and practices, have not taken steps to terminate the said practices, have not disciplined or otherwise properly supervised the individual officers who engage in the said practices, have not effectively trained their agents with regard to the proper constitutional and statutory limits on the exercise of their authority, and have instead sanctioned the policy and practices described above, through their deliberate indifference to the effect of the said policy and practices upon the constitutional rights of the residents and visitors to the Florida Keys.

29. That the aforementioned conduct on the part of the Defendants was taken without any objective basis for the Defendants' belief that their actions were lawful and their subjective reliance on their interpretation of the law was so reckless that it constituted such bad faith that it "shocks the conscience."

30. That the Defendants have stated that the roadblock shall remain in effect for at least three (3) more weeks.

31. That this Plaintiff will be deprived of his constitutional rights as a result of the fact that he maintains a boat in the Keys and he will be required to pass through the roadblock numerous times in order to return to his home.

32. That the Plaintiff has planned to fish in the keys over the next eight (8) weekends—during the height of the blue marlin and dolphin season.

33. That the deprivation of the Plaintiff's constitutional rights constitutes irreparable injury as a matter of law.

34. That the Plaintiff respectfully requests this Court to take judicial notice of the facts and circumstances surrounding this roadblock.

WHEREFORE, Plaintiff requests, jointly and severally, against all of the Defendants:

1. Compensatory damages in excess of Ten Thousand Dollars ($10,000.00).

2. Punitive damages in excess of Ten Thousand Dollars ($10,000.00).

3. Reasonable attorneys' fees and costs.

4. That a Preliminary Injunction be issued suspending and restraining the operation, enforcement of any checkpoint within one hundred (100) miles of the juncture of U.S. 1 and Card Sound Road.

5. That a Preliminary Injunction be issued restraining any secondary stop of this Plaintiff, except based upon reasonable suspicion and that no search be made, except upon probable cause.

6. That this Court issue a Temporary Restraining Order for the aforementioned injunctive relief, forthwith.

7. That this Court grant such other and further relief as appears reasonable and just.

8. A jury trial is hereby demanded.

/S/ _____
ROBERT M. JASINSKI

STATE OF FLORIDA)
) ss.:
COUNTY OF DADE)

ROBERT M. JASINSKI, being duly sworn, deposes and says that he resides in Broward County, Florida; that he is the Plaintiff herein; and that he has read the foregoing Compaint and knows the contents thereof and that the same are true of his own knowledge except as

to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ _____
ROBERT M. JASINSKI

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 2, DAY
OF APRIL, 1982.

/s/ Sharon Vicki Cornell

_____
Notary Public
State of Florida at Large

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-0814-Civ-JWK

ROBERT M. JASINSKI, PLAINTIFF

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL, DEFENDANTS.

[Filed Sept. 3, 1982]

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE) SS

ROBERT A. ADAMS, JR., being first duly sworn, deposes and states as follows;

1. I am the Chief Patrol Agent, Miami Border Patrol Sector, Miami, Florida. I am fully familiar with the facts of this affidavit. I am competent to testify.

2. I am in charge of the Miami Border Patrol Sector and responsible for all duties performed by United States Border Patrol Officers in the State of Florida.

3. I have been a Border Patrol Officer for sixteen years. I joined the force in April, 1966, and went to the Border Patrol Academy, Fort Isabel, Texas for three and one-half months of training.

I was stationed at Calexi[c]o, California, on the Mexican Border until June, 1969. While at Calexi[c]o, I investigated violations of this country's immigration laws, which included stopping and inspecting of vehicles and persons.

In June, 1969, I was transferred, pursuant to a merit promotion and reassignment plan, to San Clemente, California where a Border Patrol checkpoint had been

set up on Interstate 5. I participated in vehicle checks and examinations at that checkpoint. I was a line officer checking traffic, and was exposed to all types of responses and reactions to questioning and vehicle examination. I studied the demeanor and conduct of all types of people.

In August, 1972, I was transferred to New Orleans, Louisiana. There I was involved in (1) crewman control operation in the port of New Orleans and (2) city patrol where I checked places of business and ran investigations for undocumented aliens. I was also involved in traffic and transportation checks at the airport, train station and bus station. In all of these duties, it was necessary to ask questions and conduct inspections of vehicles and conveyances. I continued to observe the demeanor and reactions of all types of people.

I was in New Orleans for nine years. In addition to surveillance and investigations, I was the Intelligence Officer for that Sector, and after January 1979, I was the Deputy Chief Patrol Agent. I participated in numerous prosecutions for aliens smuggling, concealment, harboring and illegal entry violations.

I came to Miami in August 1981. I had been promoted to Chief Border Patrol Agent.

I have participated in, or witnessed, thousands of automobile inspections. I have seen undocumented aliens hidden in various parts of vehicles. The most common way to smuggle aliens is placement in the trunk of a car. The size of the vehicle, or the trunk does not seem to matter. I have seen more than one alien stuffed into the trunk of a small foreign car. The occupation of the driver of the car does not seem to matter, either. I have witnessed alien smuggling by various people, including professional types.

4. I was trained in operating a checkpoint at San Clemente, California where U.S. Border Patrol checkpoints were established and are still maintained. I worked at that checkpoint for three and one-half years.

Operationally, the checkpoint at Florida City, Florida was set up similar to the checkpoint in San Clemente; the procedures used in Florida City were identical to those used in San Clemente.

5. The San Clemente procedures have been in effect since 1969, when the checkpoint was established. The same procedure used there and the same criteria for stopping vehicles and conducting inspections, was used at Florida City.

6. The Florida City checkpoint was initiated as part of normal law enforcement operations of the Border Patrol, on April 18, 1982 at 4:00 p.m., pursuant to directions from Joseph Mongiello, INS Associate Regional Commissioner.

7. Twenty to thirty fixed checkpoints, similar to San Clemente, California and Florida City, Florida, are in operation daily throughout the United States. All checkpoints are operated in a similar manner. They remain at a fixed location throughout the time of the operation, and have a secondary examination site.

8. The location of the checkpoint at Florida City was selected because of its strategic location from an operational point of view. The only two roads that come out of the Keys join at Florida City, approximately one-fourth of a mile south of the checkpoint. From this checkpoint, the Border Patrol is able to survey all northbound traffic from the Florida Keys. No other location provides similar monitoring capability.

9. Signs and lights are posted, and the checkpoint is maintained per directions in the Border Patrol Handbook. The highway at the checkpoint consists of four lanes, which are narrowed to two for inspection purposes. Only northbound traffic is checked.

10. All cars are visually inspected, but not all are stopped. Only at certain brief intervals of time do we stop all cars. The average car is stopped for less than thirty seconds.

11. If a stop will take longer than thirty seconds, or if a driver is suspicious in nature, or appropriate responses cannot be received to questions regarding citizenship, the subject vehicle will be asked to move to a secondary site so as not to unduly block traffic.

12. When a stop occurs, the following questions, with slight variations in form, are asked to each person in a vehicle:

A. What is your citizenship?

B. What is your place of birth?

C. What is your status in the country?

Follow-up inquiries, if any, are limited to questions of United States citizenship, immigration status, or use of vehicle as a carrier of aliens. Authority for inspections is provided by Section 287 of the Immigration and Nationality Act. 8 U.S.C. § 1357.

13. When a person acts in an obstructionist manner, or refuses to respond to questions, experience has shown that he may be conveying an undocumented alien. When United States citizenship is determined from these questions, or no other relevant facts are found, the vehicle is directed to pass.

14. In my experience, at checkpoints or in vehicle stops, I have personally found aliens hidden in the trunks of small cars, domestic and foreign, and have also seen aliens under the hoods of cars. I know that aliens can be hidden in the larger spaces of cars and have personally witnessed such hiding. The size of the car is immaterial to secreting aliens.

15. Border Patrol Agents are trained to look for, and experienced in observing a variance in normal demeanor and actions, whether physical, emotional or verbal. I realize that people get nervous when stopped by persons in uniform and am trained to discount such nervousness. The actions which my experience has shown to be particularly meaningful and cause for additional inquiry, or inspection, are exceptional loudness,

refusal to answer questions concerning citizenship, excessive and undue protestation, claim of special status and overly aggressive behavior. When observing these manifestations, it often appears that someone is attempting to hide or secrete something.

16. Regarding this case, I was standing a few feet to the rear of the officer stationed at the main checkpoint stop sign, when I first heard the plaintiff yelling and screaming. At that point, he was approximately three car lengths from the sign. When his car reached the sign, the plaintiff was politely asked citizenship questions by the inspecting officer. He refused to answer and claimed special status as an attorney.

Upon refusal to answer, he was requested to pull out of the traffic lanes to the secondary inspection area. He refused and continued yelling and screaming, and claiming special status.

Plaintiff was informed by the inspecting officer that traffic was backing up and that if the car was not pulled over to the secondary site, Border Patrol Officers would move the car. During this time, I witnessed what was occurring, but remained uninvolved.

Plaintiff moved the car to the secondary site. Then, in an arrogant manner, he screamed at a Border Patrol Officer, at the secondary site.

17. I approached and politely asked plaintiff his citizenship. He told me he did not have to answer these questions, he was an attorney, he knew his rights and the checkpoint was illegal.

I told him that the checkpoint was legal and we had the right to ask for his citizenship.

18. Due to his demeanor, undue and excessive protestation, refusal to answer basic citizenship questions, and claim of special status, it appeared, based on my experience, that plaintiff was attempting to evade inspection. He was asked to open the trunk of his car. I advised him of Section 287.

19. He continued to refuse to answer the basic citizenship questions. I informed him he could not leave until citizenship was ascertained and we inspected the inside of the trunk. He continued to refuse to answer, and act excessively.

20. Eventually, he remarked that he was a United States citizen, but refused to open his trunk and demanded a warrant. Because this was a checkpoint inspection, and the inspection was limited, and because of the perceived attempt to evade inspection, I believed that a warrant was not needed and that I had authority, as well as probable cause to proceed. I so advised plaintiff. He refused to open the trunk.

I told him he could either voluntarily open the trunk or the Border Patrol would do so.

He continued to refuse to open the trunk of his car.

21. I told a Border Patrol Officer to open the trunk with a crowbar. In these matters, we first make an overt gesture to open the trunk with a bar. After the gesture, drivers, like plaintiff, generally open the trunk themselves. Thus, no physical damage is incurred. An inspection was made of the trunk, and plaintiff was told he was free to leave. He left.

22. While in San Clemente, I was in similar situations. In one instance, a United States citizen acted identically to plaintiff, by screaming and shouting at Border Patrol officers and contemptiously [sic] refusing to answer basic citizenship questions. He, too, was politely requested to open his trunk and refused to do so. Upon inspecting his car, I found his girlfriend, an undocumented alien, in the trunk.

In another case at San Clemente, a young man, upon reaching the checkpoint, was asked to go to the nearby secondary station for citizenship questions. He did not respond and, after being asked a second time, exhibited undue aggravation similar to plaintiff. He bolted from

the checkpoint and, after a chase and capture, a female alien was found hiding in his trunk.

I have witnessed numerous instances identical to those noted above.

23. At checkpoints, general physical searches of persons or vehicles are not conducted, absent articulable facts. Vehicles are only inspected in places large enough to secret an alien.

24. I do not make a practice of having drivers open trunks. I do so only when, as here, there are specific facts and I believe probable cause exists. I acted in good faith believing that my conduct at the checkpoint, and the inspection of plaintiff's car, was lawful. Given the circumstances at the time, my experience with the Border Patrol and the evasive conduct of plaintiff, my belief that he was hiding an alien was reasonable.

Further deponent sayeth not.

/s/ Robert A. Adams, Jr.
ROBERT A. ADAMS, JR.

Sworn and subscribed before me this 23rd day of August 1982.

/s/ Theresa M. Escobar
THERESA M. ESCOBAR
Notary Public
State of Florida at Large

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-0814-Civ-JWK

ROBERT M. JASINSKI, PLAINTIFF

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL, DEFENDANTS.

[Filed Sept. 3, 1982]

AFFIDAVIT OF JOSEPH MONGIELLO

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

JOSEPH MONGIELLO, being first duly sworn deposes and states as follows:

1. I am fully competent to testify and if called as a witness would do so.

2. I am the former Immigration and Naturalization Service Associate Regional Commissioner for the Southern Region. The State of Florida is in the Southern Region.

3. I was in charge of law enforcement.

4. As part of my duties, I directed the establishment of a checkpoint at Florida City, Florida in April, 1982. I believed, based on the information supplied to me, that such a checkpoint was a necessary law enforcement operation.

5. Twenty to thirty checkpoints operate throughout the country every day. The checkpoint at Florida City was to be operated in the same manner as all other checkpoints.

6. I knew before I ordered the Florida City checkpoint that Judge Sidney Aronovitz, in the case of

United States v. *Gordo-Marin*, 497 F. Supp. 432 (S.D. Fla. 1980), had approved a checkpoint at essentially the same location, and that the United States Supreme Court in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) had sustained the use of a checkpoint at San Clemente, California.

7. I understood that the checkpoint at Florida City was to be set up similar to one at San Clemente.

8. I was never in Florida during the time the checkpoint was first set up on April 18, 1982.

9. I do not know Robert M. Jasinski and, to the best of my knowledge, have never seen or had contact with him. I was not involved in the inspection of his vehicle and have no personal knowledge of that event.

FURTHER AFFIANT SAYETH NOT.

/s/ Joseph A. Mongiello
JOSEPH MONGIELLO

SWORN TO before me this 19th day of August, 1982.

/s/ Donna L. Garner
DONNA L. GARNER
Notary Public
State of Texas at Large

My Commission Expires: September 25, 1985

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-0814-Civ-JWK

ROBERT M. JASINSKI, PLAINTIFF

v.

R. A. ADAMS, JOE MONGIELLO AND
UNITED STATES BORDER PATROL, DEFENDANTS.

SWORN AFFIDAVIT OF ROBERT M. JASINSKI

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

ROBERT M. JASINSKI, first duly sworn, deposes and states as follows:

1. That when my vehicle was stopped on April 18, 1982, at the Florida City Checkpoint, I was never asked by anyone at anytime any questions regarding citizenship, place of birth or status.

2. Upon stopping at the "STOP" sign, I inquired in a normal voice as to why I was being directed to open my window instead of waived through the checkpoint. In response, I was told that I would have to ask the "Supervisor" that question—I asked: where is he and was told to pull over to the secondary inspection site. Upon arrival at that site, I was immediately approached by an agent and was told to "open your trunk".

3. During all of the above, I never identified myself as an attorney to the Border Patrol Agents and I was never asked to answer any questions whatsoever.

4. That at no time did I ever state that the roadblock was illegal, but I did say, upon being directed to the

secondary inspection site, that "I don't think you guys are going to be stopping cars next weekend".

5. That at no time did I scream, shout or yell.

6. That the allegations contained in paragraphs 16, 17, 18 and 19 are not only inaccurate, but are entirely false and perjurious.

7. That a Border Patrol Officer did in fact attempt to open my trunk via crowbar, but failed due to the fact that he failed to realize that he inserted the tip of the crowbar under the lower lip of trunk body which is immediately beneath the trunk lid, this not readily visible. When he pryed downward he simply pressed against the lip of the lower trunk body causing several scratches in the area of the trunk lock and gas cap shield.

8. That my trunk was not simply inspected, but was in fact searched, upon directions by R. A. Adams to a Border Patrol Officer, who was obviously embarrassed by having to perform the ridiculous task of searching a near empty trunk.

9. That the trunk of a CAMARO has less space than a Toyota "Celica", as I recall reading in "Consumer Reports".

10. That I asked R. A. Adams if he thought I was an "immigrant" when he informed me that he had authority to search my trunk under the Immigration and Nationality Act, 8 U.S.C. Section 1357, to which he responded "no".

11. That there are two reasons why I don't store things in my trunk: (1) there is very little room there and (2) when the temperature gets up into the high eighties and the sun is intense as it was at 4:00 P.M. on April 18, 1982, the temperature inside my trunk gets up to at least 140°F—high enough to melt the wax in my backpacker lantern; high enough to ruin expensive diving equipment and virtually anything made from

rubber; high enough to kill any alien (of the earthly variety).

12. That I did advise a local news crew that I was an attorney and that they better be careful since they were recording R. A. Adams voice by sticking a microphone through my passenger window in order to record myself and Adams, who was standing next to the drivers' window. They were informed that R. A. Adams was some kind of a nut and he might just be crazy enough to arrest them for recording his voice without prior consent especially when the microphone was being concealed from Agent Adams view. (Fla. Sta. Sec. 934.02).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Robert M. Jasinski
ROBERT M. JASINSKI

Sworn to and subscribed before me this ____ day of September, 1982.

Notary Public
State of Florida at Large

Office-Supreme Court, U.S.
FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1324 (2)

In The
Supreme Court of the United States
October Term, 1984

R. A. ADAMS AND JOSEPH M. ONGIELLO,
Petitioners,

v.

ROBERT M. JASISNKI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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34 pp

RESTATEMENT OF QUESTION PRESENTED

WHETHER A DENIAL OF A MOTION FOR SUMMARY DISPOSITION BASED ON A DEFENSE OF QUALIFIED IMMUNITY IN A *BIVENS* ACTION IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291 WHEN THERE EXISTS A CLAIM FOR INJUNCTIVE RELIEF, WHICH IS NOT SUBJECT TO AN IMMUNITY DEFENSE.

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STATEMENT

In this interlocutory proceeding Petitioners, Chief Adams and Joseph Mongiello, the former I.N.S. Associate Regional Commissioner for the Southern Region, claim that they are entitled to qualified immunity from suit arising out of the search of the plaintiff's trunk at the Florida City Checkpoint. The statement of facts set forth in the Petitioners' "Statement" is essentially correct. However, the Respondent would like to point out that there is sharp disagreement concerning the demeanor of the Respondent. The Respondent's version of the incident as set forth in his Verified Complaint, Pet. App. 10a-17a, and Affidavit, Pet. App. 27a-29a, is in sharp contrast with Chief Adams' account of the incident. Fortunately, for the Respondent, much of what transpired at the checkpoint between Chief Adams and the Respondent was videotaped by a local news team. Whether or not the news station can be compelled to produce the unedited tapes, in order to straighten out the discrepancies once and for all, has not been decided due to the fact that the district court has stayed the trial of this matter along with all discovery. Resp. App. A.

The Petitioners actually filed two (2) Motions for Summary Judgment in this case. Their first motion for summary judgment and/or to dismiss was filed on September 3, 1982. It was denied on November 12, 1982. Resp. App. B. On January 28, 1983, a little more than two (2) weeks prior to the trial, the Petitioners filed a second motion for summary judgment and/or motion to dismiss, wherein they basically rehashed what had been argued earlier. The Petitioners are appealing the dismissal

of their appeal from the second motion for summary judgment and/or to dismiss. The Respondent did not raise the issue of timeliness with the appellate court. Fed.R. App.P. 4.

The Respondent's case is a *Bivens* action seeking damages arising out of the violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Respondent is no longer asserting any claim pursuant to 42 U.S.C. § 1983.

Injunctive relief has been requested. The Respondent has asked the district court to pass upon the methods used by the I.N.S. in its efforts to enforce the immigration laws enacted by Congress. The district court has yet to hear the Respondent's request for injunctive relief. In that the Petitioners have repeatedly asserted their right to re-establish the checkpoint at Florida City this issue is not moot.

SUMMARY OF ARGUMENT

A. That an Appellate Court should refrain from exercising jurisdiction to hear an interlocutory appeal involving a good faith immunity defense when the law is well settled and the facts are in dispute. Since Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, cannot be granted when a substantial controversy exists regarding material facts, the district court had no choice, other than to deny the Petitioners' Motion for Summary Judgment and/or to dismiss. The law is well-settled regarding the need for probable cause

in order to conduct a search at a fixed checkpoint, not the functional equivalent of the border. Furthermore, the law is clear that one may not even interrogate at a fixed checkpoint unless the Border Patrol Agent believes that the person interrogated is an alien.

B. The Supervisor of the Florida City Checkpoint, Petitioner, Joseph Mongiello, can be held responsible for the actions of his subordinates, if he failed to insure that his men were adequately trained and were familiar with the proper standards to be applied with reference to the interrogation and searches of aliens and citizens at fixed checkpoints. If the facts, at trial, show that Joseph Mongiello failed to take any reasonable steps to protect the motoring public, from blatently unconstitutional searches and seizures on the part of his subordinates, he should be held responsible. A supervisor should be held responsible when he does something or fails to do something that results in a constitutional violation, on the part of his subordinates.

———o———

ARGUMENT

I. IN HIS MOTIONS FOR SUMMARY JUDGMENT, DEFENDANT R. A. ADAMS BASED HIS RIGHT TO SEARCH THE PLAINTIFF'S TRUNK ON THE BELIEF THAT PROBABLE CAUSE EXISTED: SINCE THE LAW REGARDING PROBABLE CAUSE IS CLEARLY ESTABLISHED, HE SHOULD NOT BE PERMITTED TO DELAY THE TRIAL BY FILING A FRIVOLOUS INTERLOCUTORY APPEAL

A. Defendant R. A. Adams Based His Motions For Summary Judgment On His Belief That Probable Cause Existed To Believe Aliens Were Hidden In The Trunk Of Plaintiff's Vehicle.

In his two (2) Motions for Summary Judgment, Petitioner Adams has argued that the sole basis for the search of the Respondent's trunk was that he had probable cause to believe that aliens were hidden in the Respondent's trunk. (Aff. of Adams, Pet. App. I 18a-24a) (Motion for S/J ¶ 3(g) R. 272[1]). Adams responded in the negative when asked if he believed that he had the right to inspect automobile trunks for aliens without a warrant, consent, or probable cause. (Notice to Admit #12, R. 187; Ans. # 12 R. 192).

In order to prevail on a motion for summary judgment based upon a "good faith" defense, a defendant must make a prima facie showing that either the law has changed after the incident or was clearly unsettled at the

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[1] R. refers to record on appeal; Pet. App. refers to Petitioner's Appendix; and Res. App. refers to Respondent's Appendix.

time the defendant violated a plaintiff's constitutional rights. *See e.g., Silverman v. Ballantine,* 694 F.2d 1091 (7th Cir. 1982) (right to counsel at point of arrest); *Jihard v. O'Brien,* 645 F.2d 556 (6th Cir. 1981); *Chagnon v. Bell,* 642 F.2d 1248 (D.C. Cir. 1980). The Court in *Harlow v. Fitzgerald,* 429 U.S. 800 (1982), "adjusted" the qualified immunity standard established by its earlier decision and dispensed with the subjective test of official good faith. In light of *Harlow,* the "good faith" of the defendant officials is tested by purely objective standards. Officials are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818; *see also, Bueno v. City of Donna,* 714 F.2d 484 (5th Cir. 1983).

The Court has consistently defined probable cause as follows: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient . . . good faith is not enough." *Carroll v. United States,* 267 U.S. 132, 161 (1925); *United States v. Ross,* 456 U.S. 798 (1982); *Brinegar v. United States,* 338 U.S. 160 (1949); *Henry v. United States,* 361 U.S. 98 (1959). Thus, it cannot be said that the law regarding probable cause was not clearly established. Since the law concerning probable cause was clearly established, the immunity defense should fail unless the defendants can prove that they neither knew nor should have known of the relevant legal standard. *Harlow,* 457 U.S. at 819. When the law is clearly established, interlocutory appeals serve no useful purpose.

B. Chief Adams Did Not Believe That The Florida City Checkpoint Was The Functional Equivalent Of The Border.

The Petitioners have never asserted their belief that the Florida City Checkpoint was the functional equivalent of the border in any responsive pleading or affidavit. Chief Adams was mistaken in his belief that 8 U.S.C. Sec. 1357 gave him authority to search [inspect] for aliens at fixed checkpoints not the functional equivalent of the border. In order to understand what happened on April 18, 1982 one need look no farther than the affidavit of Chief Adams in support of his motion for summary judgment. Pet. App. 18a-24a. Paragraph 3 of the affidavit points out that Chief Adams worked the San Clemente California Checkpoint on I-5 from June 1969 until August 1972. He has not worked a checkpoint since then. During that time Chief Adams "witnessed thousands of automobile inspections."

In paragraph 5 Chief Adams swore under oath that

> [t]he San Clemente procedures have been in effect since 1969, when the checkpoint was established. The same procedure used there and the same criteria for stopping vehicles and conducting inspections, was used in Florida City.

Id.

Prior to this court's holding in *United States v. Ortiz,* 422 U.S. 891 (1974), that the Fourth Amendment forbids the searching of automobiles at traffic checkpoints not the functional equivalent of the border, in the absence of consent or probable cause, the lower courts had uniformly held that pursuant to 8 U.S.C. § 1357 border patrol agents had authority to search vehicles for aliens at all fixed check-

points. *See Bowen v. United States,* 422 U.S. 916, 918 n. 1 (1974). This appears to have been a routine procedure prior to *Ortiz. See e.g., United States v. Thompson,* 475 F.2d 1359 (5th Cir. 1973); *Mienke v. United States,* 452 F.2d 1076 (5th Cir. 1971); *Morales v. Hamilton,* 391 F. Supp. 85 (D. Ariz. 1975).

To make matters worse for Chief Adams, he was instructed by Petitioner Mongeillo that "searches conducted by Border Patrol Agents will be based only on probable cause, consent or a search warrant." Resp. App. C. Unfortunately, Petitioner Mongeillo used the word "search" instead of "inspection." Apparently, Chief Adams believed that he could not conduct full-fledged searches—in other words, searches in areas too small to conceal an alien. This was the law as Chief Adams understood it, based on his three and one-half years of training at San Clemente. Mongeillo should have realized that Chief Adams had not worked a checkpoint since 1972 and that there had been some drastic changes in the law since Chief Adams last worked a checkpoint.

The Petitioners' claims of immunity turn on disputed questions of fact and are inextricably bound up with the merits of the claims. The objective reasonableness, probable cause, is a question of fact for a jury to decide. *See Smiddy v. Varney,* 665 F.2d 261, 265 (9th Cir. 1981), *cert denied,* 459 U.S. 829 (1982); *McKenzie v. Lamb,* 738 F.2d 1005, 1008 (9th Cir. 1984) (summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause).

Chief Adams should have known that he could not conduct inspections for illegal aliens pursuant to 8 U.S.C. § 1357 absent consent or probable cause.

C. Even If One Reviews The Facts In The Light Most Favorable To Petitioners The Alleged Conduct Complained About On The Part Of The Plaintiff Fails To Even Establish Reasonable Suspicion.

The Court in *United States v. Brignoni-Ponce,* 422 U.S. 873, 884-85, 95 S.Ct. at 2581-82 (1975), set forth the factors to be considered in determining whether "reasonable suspicion" exists in a non-fixed checkpoint situation.[2] A careful review of the factors set forth in *Brignoni-Ponce* demonstrates that the defendants have failed to establish the existence of even reasonable suspicion to believe that the plaintiff was harboring aliens in the trunk of his vehicle. The petitioners' argument to the contrary is patently frivolous.

II. THE DEFENDANTS SHOULD NOT BE PERMITTED TO ARGUE THAT THE STATUS OF THE CHECKPOINT WAS AMBIGUOUS WHEN THEY HAVE FAILED TO ARGUE OR OFFER PROOF IN THEIR MOTIONS FOR SUMMARY JUDGMENT THAT THE LAW REGARDING FIXED CHECKPOINTS WAS NOT CLEARLY ESTABLISHED AND THAT FLORIDA CITY WAS IN FACT THE FUNCTIONAL EQUIVALENT OF THE BORDER

Although there was some ground for confusion about the state of the law in the former Fifth Circuit at the

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[2] Factors to be considered include: (1) characteristics of the area in which the vehicle is encountered; (2) unusual patterns of traffic on the particular road; (3) proximity to the border; (4) information about recent illegal crossings in the area; (5) appearance of the vehicle; (6) number and appearance of the passengers; (7) behavior of the driver; and (8) behavior of the passengers. *Brignoni-Ponce,* 422 U.S. at 884-85. The experience of the agents is also a relevant factor. *United States v. Pacheco,* 617 F.2d 84, 85 (5th Cir. 1980). Conversely, newly arrived Border Patrol Agents unfamiliar to the area are not entitled to the same deference. *United States v. Orona-Sanchez,* 648 F.2d 1039 (5th Cir. 1981) (Unit A).

time *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), was decided, that confusion has long since been cleared up. *See Bowen v. United States,* 422 U.S. 916, 918 n. 1 (1975). The former Fifth Circuit has specifically set forth the factors to be used in determining whether a checkpoint location is in fact the functional equivalent of the border. *See United States v. Reyna,* 563 F.2d 1169, 1170 (5th Cir. 1977), *cert. denied,* 439 U.S. 871 (1978); *see also United States v. Brennan,* 538 F.2d 711, 716 (5th Cir. 1976); *see also United States v. Arredondo-Hernandez,* 574 F.2d 1312 (5th Cir. 1978) ("consent or probable cause is required to convert a permanent checkpoint stop into a constitutional search").

Since the law regarding fixed checkpoint searches was clearly established on April 18, 1982, the respondent cannot understand why the petitioners should be raising this issue on interlocutory appeal (Suppl. Brief of Appl't p. 7), especially in light of the uncontroverted fact that Chief Adams has unequivocally stated that he based his right to search on his good faith belief that he had probable cause to believe that there were aliens in the plaintiff's trunk (Mot. for S/J, ¶ 3(g), R. 272) (search only when probable cause exists). If the petitioners entertained a "good faith" belief that Florida City was the functional equivalent of the border, they certainly would have advanced that argument during the hearing on the motion for a temporary restraining order in *Hartfield v. Commissioner, etc.,* Case No. 82-807-CIV-CA (S.D.Fla. 1982) (sought injunctive relief to halt checkout). Instead the petitioners waited until this case was up on interlocutory appeal, with an inadequate record, to raise the argument that Florida City was reasonably believed to be the functional

equivalent of the border (Suppl. Brief of Appl't p. 7). Issues important enough to be raised on appeal should be raised first at the trial court level, where an evidentiary hearing can be relied upon to establish a complete record. An emergency hearing on a temporary restraining order is hardly the place to establish a complete record of all relevant facts and issues, especially when the plaintiff was not even a party to that action.

The aforementioned allegation on the part of the defendants is outrageous in light of the following facts:

(a) R. A. Adams, in response to Plaintiff's Interrogatory ¶15, which reads: "If Agent Adams believed he was in fact conducting a valid border search or search at the 'functional equivalent of the border,' please state in detail: (a) Exactly what facts and laws lead Agent Adams to the conclusion that he was conducting a valid border search?", answered as follows: "N/A." R. 237-54.

(b) During the *Hartfield, supra,* hearing, the attorney for Key West asked CHIEF ADAMS, "[h]ow many cars have you stopped at that checkpoint at Florida City that had been travelling internationally?" Defendants' attorney, Mr. Rosenberg, objecting, aptly noted that, "Your Honor, I'm not sure we are not in an area of absurdity here." *Hartfield* Tr. at 90. Since *United States v. Renya, supra,* specifically made the "ratio" of foreign to domestic traffic the test of "functional equivalency," the defendants' assertions, in their briefs, that they believed that Florida City was the functional equivalent of the border is, quoting Mr. Rosenberg, "an area of absurdity." *See also* Resp. App. D.

The defendants have failed to demonstrate that they relied in good faith on the belief that Florida City was the functional equivalent of the border. Without any such proof, they should not be permitted to even raise a good faith defense based upon such a belief. *Fidler v. Rundle,* 497 F.2d 794 (3d Cir. 1974); *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 828 (3d Cir. 1976).

III. NEITHER HARLOW NOR RULE 56 APPLIES TO ACTIONS WHERE INJUNCTIVE RELIEF IS SOUGHT: THEREFORE, AN INTERLOCUTORY APPEAL FAILS TO SERVE ANY USEFUL PURPOSE IN THAT THIS ACTION WILL CONTINUE EVEN IF THE DEFENDANTS HAVE ESTABLISHED A GOOD FAITH IMMUNITY DEFENSE

A good faith defense may not be asserted as a defense to a claim for injunctive relief. *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Knell v. Bensinger,* 522 F.2d 720 (7th Cir. 1975); *Hupart v. Board of Higher Educ.,* 420 F.Supp. 1087, 1107-08 (S.D. N.Y. 1976). Even a favorable ruling in the defendants' favor on their Motion for Summary Judgment would not terminate the plaintiff's action, at least against Chief Adams[3], since there would still exist a claim for injunctive relief. Thus, the purpose of permitting an interlocutory appeal on the "good faith" defense would not serve the purpose for which an interlocutory appeal was intended to serve, namely: "to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow,* 457 U.S. at 818.

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[3] Petitioner Mongiello has retired from service with the I.N.S.

In *Harlow v. Fitzgerald,* 457 U.S. at 819 n.34 (1982), the Court noted that:

> We emphasize that our decision applied only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

Furthermore, the Court in *United States v. Martinez-Fuerte,* 428 U.S. 543, 559 (1976), pointed out that

> a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

The plaintiff, consistent with *Martinez-Fuerte,* wishes to test the reasonableness of using Florida City as a checkpoint, in the absence of a situation similar to the one created by the unprecedented influx of refugees caused by the Mariel boatlift. *United States v. Gordo-Marin,* 497 F.Supp. 432 (S.D. Fla.), *aff'd* 659 F.2d 58 (5th Cir. 1981). The plaintiff questions the logic of *McSurely v. McClellan,* 697 F.2d 309 (D.C. 1982), permitting interlocutory appeals when a finding of a good faith immunity will not put an end to the litigation.

IV. PERSONAL PARTICIPATION IS NOT A NECESSARY PREREQUISITE TO IMPOSING LIABILITY UPON THE SUPERVISORY DEFENDANT MONGIELLO

In civil rights litigation, a federal official cannot be held vicariously liable for the acts of his subordinates. *Bowen v. Watkins,* 669 F.2d 979, 988 (5th Cir. 1982); *Reimer v. Smith,* 663 F.2d 1316, 1329 (5th Cir. 1981). Personal involvement will be sufficient to find liability

where the supervisor directs or approves the act in question. *Reimer, supra.*

When a duty exists to train or supervise subordinates, a supervisor can be held liable when there is a failure to properly train or supervise which causes a constitutional violation. *See Sims v. Adams,* 537 F.2d 829 (5th Cir. 1976); *McClelland v. Factern,* 610 F.2d 693, 695-96 (10th Cir. 1979); *Henzel v. Gerstein,* 608 F.2d 654 (5th Cir. 1979).

The issue, correctly phrased, is whether the supervisor has done something, or failed to do something which ought to have been done, which was a proximate cause of the violation of the plaintiff's constitutional rights. *Black v. Stephens,* 662 F.2d 181, 189 (3d Cir. 1981); *Bowen v. Watkins,* 669 F.2d 979, 988-89 (5th Cir. 1982).

Defendant Mongiello has not set forth any facts which absolve him of liability other than the fact that he was not physically present on the scene. As such, his claim of qualified immunity must fail.

V. QUALIFIED IMMUNITY IS NOT SUBJECT TO INTERLOCUTORY APPEAL UNDER THE COLLATERAL ORDER DOCTRINE[4]

The denial of summary judgment is interlocutory in nature and thus not appealable. *In re Smith,* 735 F.2d 459 (11th Cir. 1984). However, it is generally held that a denial of summary judgment based on a claim of ab-

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[4] The Brief for the Respondent filed in *Mitchell v. Forsyth,* cert granted, No. 84-333 (Oct. 29, 1984), deals extensively with the question of the appealability of claims based upon qualified immunity. The Respondent has attempted to avoid rehashing what has already been said on the subject.

solute immunity is appealable. See e.g. *Flanagan v. United States,* — U.S. —, 104 S. Ct. 1051 (1984); *Argromayor v. Colberg,* 738 F.2d 55 (1st Cir. 1984); *Spiess v. C. Itoh Co.,* 725 F.2d 970 (5th Cir. 1984) (employment discrimination); *cf. San Filippo v. U. S. Trust Co. of New York,* 737 F.2d 246, 248 (2nd Cir. 1984) (nonfrivolous claim of absolute immunity presents appealable issue).

The reason for appealability in absolute immunity cases is that absolute immunity protects defendants from the burden of trial as well as liability. *William v. Collins,* 728 F.2d 721 (5th Cir. 1984) ("This absolute immunity does not hinge on functional analysis as with constitutional torts."); *Powers v. Lightner,* 752 F.2d 125 (7th Cir. 1985) ("Qualified immunity grants no absolute right not to be subjected to trial. . . .").

> A claim of absolute immunity, like a claim of double jeopardy, should be determined before a trial on the merits. In each situation a defendant contests a plaintiff's right to "hale him into court." The district court here conclusively determined the immunity question. Immunity is important and collateral to the merits of the action. The right to immunity is a question of law and is arguably lost once the trial is held.

Chevez v. Singer, 608 F.2d 420, 421 (10th Cir. 1983).

However, since ". . . the collateral order exception is a narrow one and reserved for rare cases", *Bever v. Gilbertson,* 724 F.2d 1083, 1087 (4th Cir. 1984); *See e.g., Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), it has been held that

> because the rights encompassed by the doctrines of absolute and qualified immunity are not coextensive

> with respect to subjection to trial, the lesser right afforded by qualified immunity does not necessitate the right to interlocutory appeal that absolute immunity does.

Powers v. Lightner, 752 F.2d at 1255.

The Petitioners in this case have failed to show that their right, if any, to a qualified immunity defense, is "incapable of vindication on appeal from final judgment." *United States v. W.H. Moseley Co.,* 730 F.2d 1472, 1475 (Fed. Cir. 1984).

A. Petitioners' Appeal Has Failed To Present A Serious And Unsettled Question Of Law.

In *Bever v. Gilbertson,* 724 F.2d at 1088 the court aptly noted that

> one of the requirements for immediate appealability of a collateral order under the *Cohen* doctrine is that is present a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

This additional requirement, that an interlocutory appeal present "a serious and unsettled question of law", was added to the *Cohen* elements in *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982). In the case at bar there are no serious and unsettled questions of law that are worthy of review by an appellate court. The only issue in this case is whether or not Chief Adams acted in a reasonable manner when he attempted to pry open the Respondents trunk with a crowbar in order to conduct an inspection for aliens. Chief Adams based his right to search on 8

U.S.C. § 1357 which permits Border Patrol Agents to search at fixed checkpoints, not the functional equivalent of the border, when probable cause exists to believe that a particular vehicle is being used to transport illegal aliens. The issue presented to the trial court was no different from what the trial court would have had to decide if asked to decide a motion to suppress. Motions to suppress are filed on a routine basis in criminal actions. The courts are called upon to decide the issue of probable cause in numerous cases involving a myriad of factual situations. There simply is no reason to suspect that the district courts will not be able to determine whether an official's discretionary action has violated clearly established law. Officials are protected in that

> the trial itself transgresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded. Judges are not infallible, and errors may be anticipated in application of the *Harlow* standard like any other. Nevertheless, few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights, far too few to invoke the *Harlow* policy of preventing the risk of litigation from deterring good candidates from seeking office or good office holders from performing their duties.

Kenyatta v. Moore, 744 F.2d 1179, 1184 (5th Cir. 1984).

In this case "the danger of denying justice by delay" is great. However, it is the Respondent that is being denied justice. It has been over three (3) years since this lawsuit has been filed. The stay entered by the trial court has prevented the Respondent from preserving the unedited videotapes, which will conclusively prove one way or another how the I.N.S. was conducting the checkpoint

at Florida City. Since the Petitioners have belatedly raised the issue that Florida City was in fact the functional equivalent of the border, it will be necessary to recover evidence rebutting any such assertion. The passage of time will make this a far more costly task.

One of the Respondents' witnesses has passed away while this case was up on appeal. Most likely, much of the memories of the witnesses in this matter will have faded into oblivion by the time this case gets to trial. Surely, this does not comport with the "just, speedy, and inexpensive determination of" the action. Fed.R.Civ.P. 1.

This case does not represent an isolated incident. The Respondent was one of four attorneys that were directed to the secondary inspection area at Florida City. Three of the four attorneys were ordered to open their trunks for inspection. One of the attorneys even had a "Nike" shoe box inspected by a Border Patrol Agent who readily asserted that he had authority to search for drugs. Resp. App. E.

"With increasing frequency [the courts] are requested to pass upon the method used by the Immigration Service (the I.N.S.) in its efforts to enforce the immigration laws enacted by Congress." *Zepeda v. United States I.N.S.*, 753 F.2d 719 (9th Cir. 1985).

The Respondent knows of no other federal agency that has been enjoined with such frequency for violating Fourth Amendment rights of citizens. *See e.g. Zepeda, supra; Illinois Migrant Council v. Pilliod,* 540 F.2d 1062 (7th Cir. 1976), reheard in banc, 548 F.2d 715 (1977); *Au Yi Lau v. United States Immigration and Naturalization Service,* 590 F.2d 497 (3rd Cir. 1979); *Marquez v. Kiley,* 436 F. Supp. 100 (S.D.N.Y. 1977). The Respondent,

in his action for injunctive relief, has attempted to impose restraints on how the I.N.S. conducts inspections at the Florida City checkpoint, even in the event that the district court determines that Forida City is a reasonable location to establish a checkpoint, absent the extraordinary number of alien traffic created by the 1980 Mariel Boatlift.

Ultimately, the Respondent hopes to prove that the checkpoint at Florida City was a mere "pretext." The I.N.S. was not looking for aliens—they were looking for drugs! *See 1982 Annual Report of the Immigration and Naturalization Service* at 7 ("The I.N.S. supported the Interagency Task Force on Drug Enforcement, particularly in South Florida."). Since the I.N.S.'s own records indicate that the influex of Haitian arrivals in Miami had virtually come to a halt, *Id.* at 8, what other reason could possibly justify such rash action on the part of the I.N.S.?

—o—

CONCLUSION

The Judgment of the Court of Appeals should be affirmed and the case remanded to the District Court.

Respectfully submitted,

ROBERT M. JASINSKI
The Roney Plaza—Suite M-8
2301 Collins Avenue
Miami Beach, FL 33139
(305) 538-4421

Pro se

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, et al.,

Defendant.

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

(Filed April 25, 1983)

This matter arose upon Defendants' motion for protective order. After reviewing the motion, supporting memorandum, the Plaintiff's response and the file, it is

ORDERED AND ADJUDGED that the motion is GRANTED and the (4) notices of deposition dated March 17, 1983 are quashed.

It is further

ORDERED AND ADJUDGED that all further discovery be stayed pending a decision of the Court of Appeal.

DONE AND ORDERED In chambers at Miami, Florida, this 25th day of April, 1983.

/s/ James W. Kehoe
United States District Judge

cc: Robert Rosenberg, AUSA
Alan S. Kessler, Esquire

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, JOE MONGIELLO, et al.,

Defendants.

ORDER DENYING MOTION TO DISMISS AND/OR SUMMARY JUDGMENT

(Filed November 12, 1982)

This matter arose upon Defendants' motion to dismiss and/or motion for summary judgment.

After reviewing said motion, the memoranda of law of the respective parties and the file, it is

ORDERED that the motion filed September 3, 1982 is hereby DENIED.

DONE AND ORDERED in chambers at Miami, Florida, this 12th day of November, 1982.

/s/ James W. Kehoe
United States District Judge

CC: Robert A. Rosenberg, Esquire
Alan S. Kessler, Esquire

APPENDIX C

MEMORANDUM

SR 40/33.7

Subject: Traffic Check, Highway #1, Florida City.

Date: April 13, 1982.

To: Chief Patrol Agent, Miami, Florida.

From: Joseph A. Mongiello, Associate Regional Commissioner, Enforcement, Southern Region.

/s/ Joseph A. Mongiello

I have reviewed your plans for conducting a traffic check operations at Florida City. I have also reviewed intelligence data, records of arrest of deportable aliens and other material which indicate that aliens are entering the U. S. without inspection in the general area of the Florida Keys. In order to intercept those aliens as they proceed north, your plan to utilize the forty-one officer REACT team detailed to Krone North, is approved.

You should plan to commence the operation at 8:00 AM on Sunday, April 18 and terminate at 4:00 PM on Monday, April 26. A complete evaluation of the operation will be made during the week of April 26, and decisions as to future traffic check operations will be made following our evaluation.

Officers presently assigned to Krone will be considered on detail to Miami Sector, under the supervision of the Chief Patrol Agent. You should prepare 52's to document the detail from Program 3110 to Program 2110. ACPA Chandler will be your principal supervisor on the scene, with overall responsibility for the checkpoint operation. Operational planning must include immediate re-

sponse capability to events at Krone North necessitating a REACT team presence.

The checkpoint will be an INS operated facility, under the authority of Section 287 of the I&N Act. Initial examination of vehicles and occupants will be conducted by Border Patrol Agents. Although other agencies such as Customs and DEA may wish to have officers present, their participation will be limited to secondary inspections. Any searches conducted by officers from other agencies must be undertaken under their own authority to search and seize. Border Patrol Agents will conduct their inspections under the guidelines of the Supreme Court's decision in *Martines-Fuerte*. Searches conducted by Border Patrol Agents will be based only on probable cause, consent or a search warrant.

APPENDIX D

Transcript of Hearing On TRO

Hartfield v. Commissioner, 82-807-CIV-CA (p. 3)
(S.D. Fla. 1982)

THE COURT: May I ask a few preliminary questions of counsel?

Does the government concede that the stopping of a vehicle under these circumstances alleged here and conducting a search on a routine basis, without probable cause or reasonable suspicion, would be unlawful?

MR. ROSENBERG: Your Honor, the word "search" presents a problem here and I would like to be able to discuss that for a second. What the government is doing here is conducting an inquiry regarding citizenship. Now, if the Court is then saying, beyond that a search is being conducted without probable cause, that is not what is happening from our point of view and that may well be improper.

THE COURT: Then, for the purpose of this hearing, you would concede that if the stopping were done and routine searches were conducted without probable cause or reasonable suspicion, that would be a violation of the Fourth Amendment?

MR. ROSENBERG: If an officer is doing that, that is not the typical procedure being done and that officer in that one instance may be violating the Fourth Amendment. But I would like to make a statement to the Court, if I can, because I think I can. . . .

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 82-0814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, JOE MONGIELLO and
UNITED STATES BORDER PATROL,

Defendant.

SWORN AFFIDAVIT OF NORMAN KENT

State of Florida, County of Broward, SS.

BEFORE ME, the undersigned authority, personally appeared Norman Kent, who, after being duly sworn, on oath, deposes and states the following:

(1). I am an attorney practicing law in Fort Lauderdale, Florida.

(2). On April 18, 1982 at approximately 5:30 pm. I was returning from a weekend in the Keys, and reached the Florida City Checkpoint of the U.S. Border Patrol.

(3). I was driving a 1980 Camaro and was wearing only green dungaree shorts and sandals.

(4). The only "passenger" in my vehicle was my six year old golden retriever, "Daybreak," a watchdog, who was barking loudly at the uniformed officers stopping vehicles in front of me.

(5). When I reached the checkpoint, my vehicle was visually inspected by a border guard—whose name I don't recall—and I was then asked to open the trunk of my car.

(6). I asked why and was told my trunk "was low to the ground," which to the best of my knowledge, is not unusual for a Camaro.

(7). As I stepped out of the car, I was asked my citizenship, I advised the guard that "I was an American, and a practicing Criminal lawyer in Fort Lauderdale."

(8). I opened the trunk, and the guard reached in and lifted open a green Nike shoebox to find my dirty softball cletes therein.

(9). I then sarcastically inquired of him whether he was seeking out dehydrated aliens. He responded by saying the Border God (sp.) was also permitted to search for illegal drugs. I responded by saying that was something a Court would have to decide, not you.

(10). The trunk was then closed and I went on without further interruption. The actual inspection took no more than 60 seconds, but was very irritating in the manner in which it was conducted. These people are supposed to be working for us, not against us.

FURTHER, AFFIANT SAYETH NOT.

/s/ Norman Elliot Kent

Sworn to and Subscribed before me this 14th day of September, 1982.

/s/ Kathleen A. Falls, Notary Public, State of Florida at Large.

My commission expires: May 11, 1983.